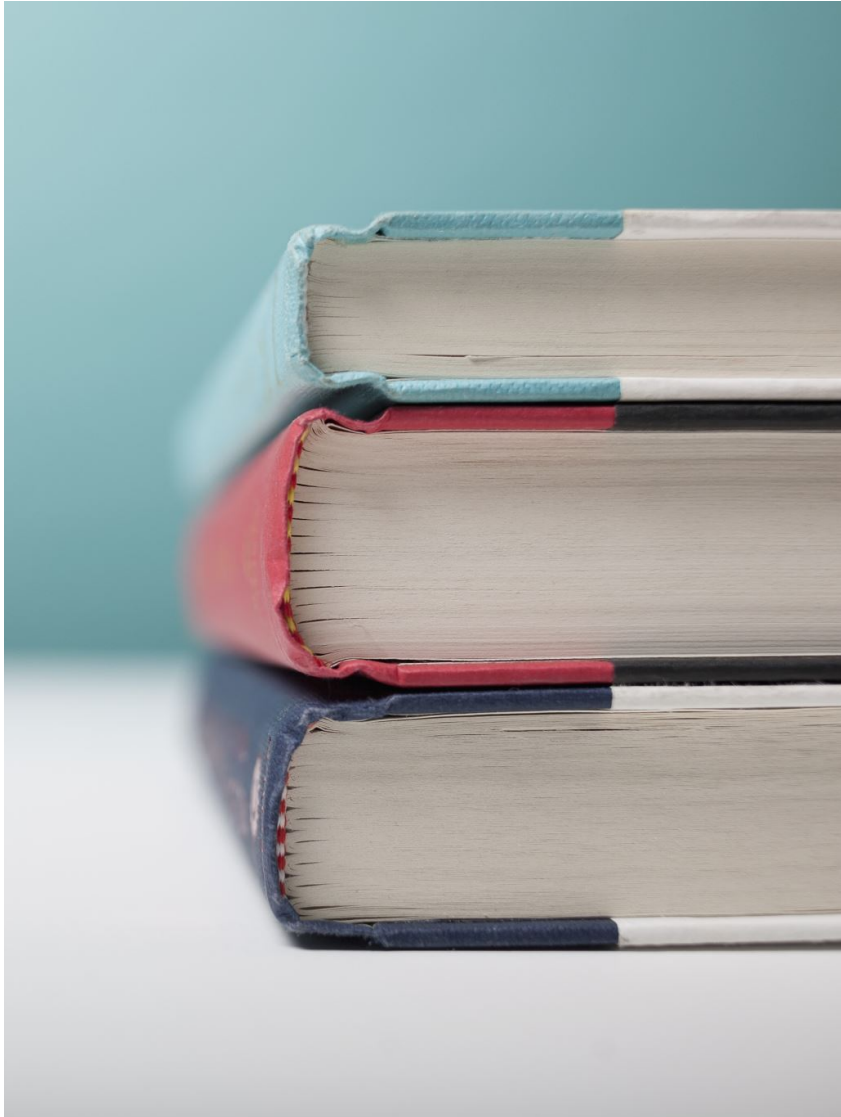


TITLE IX AND INVESTIGATING FORMAL COMPLAINTS

ANDREWS & PRICE, LLC

WHAT IS TITLE IX?



TITLE IX

- Federal law that protects people from discrimination based on sex in education programs or activities that receive Federal financial assistance
 - Includes locations, events, or circumstances over which the school exercises or exercised substantial control over both the accused and the context in which the sexual harassment occurs
- Requires that schools and districts take appropriate steps to address sex discrimination
- Applies to all incidents of **sexual misconduct, including sexual harassment and assault** that involve student-on-student misconduct and staff-on-student misconduct

TITLE IX

- Previously, Office of Civil Rights issued *Dear Colleague Letters* served as guidance for K-12 entities
- New regulations were released on May 6 by the Department of Education after a series of public comment and review
- Significant because now public K-12 entities that receive federal funds must respond to sexual harassment allegations in line with the requirements
- Goes into effect on August 14, 2020

SEXUAL HARASSMENT DEFINITION

Includes 3 types of misconduct on basis of sex:

- any instance of *quid pro quo* harassment by a school's employee;
 - Conditioning an educational benefit service upon participation in sexual conduct
- any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access;
- dating violence, domestic violence, or stalking
 - Reports of sexual assault, dating violence, domestic violence, and stalking are not subject to the “severe, pervasive, and objectively offensive” standard

SCHOOL DISTRICT POLICY

POLICY 103

NONDISCRIMINATION/DISCRIMINATORY HARASSMENT – SCHOOL AND CLASSROOM PRACTICES

Authority.

The Board declares it to be the policy of this district to provide an equal opportunity for all students to achieve their maximum potential through the programs offered in the schools without discrimination on the basis of race, color, age, creed, religion, sex, sexual orientation, ancestry, national origin, marital status, pregnancy or handicap/disability. [\[1\]](#)[\[2\]](#)[\[3\]](#)[\[4\]](#)[\[5\]](#)[\[6\]](#)[\[7\]](#)[\[8\]](#)[\[9\]](#)[\[10\]](#)[\[11\]](#)[\[12\]](#)[\[13\]](#)[\[14\]](#)[\[15\]](#)[\[16\]](#)[\[17\]](#)[\[18\]](#)[\[19\]](#)

The district strives to maintain a safe, positive learning environment for all students that is free from discrimination. Discrimination is inconsistent with the educational and programmatic goals of the district and is prohibited on school grounds, at school-sponsored activities and on any conveyance providing transportation to or from a school entity or school-sponsored activity.

The district shall provide to all students, without discrimination, course offerings, counseling, assistance, services, employment, athletics and extracurricular activities. The district shall make reasonable accommodations for identified physical and mental impairments that constitute handicaps and disabilities, consistent with the requirements of federal and state laws and regulations.

The Board encourages students and third parties who believe they or others have been subject to discrimination to promptly report such incidents to designated employees, even if some elements of the related incident took place or originated away from school grounds, school activities or school conveyances.

The Board directs that verbal and written complaints of discrimination shall be investigated promptly, and appropriate corrective or preventative action be taken when allegations are substantiated. The Board directs that any complaint of discrimination brought pursuant to this policy shall also be reviewed for conduct which may not be proven discriminatory under this policy but merits review and possible action under other Board policies.

DEFINITIONS

Definitions

Discriminatory Harassment

Harassment by students, employees or third parties on the basis of race, color, age, creed, religion, sex, sexual orientation, ancestry, national origin, marital status, pregnancy, handicap/disability or for participation in reports or investigations of alleged discrimination is a form of discrimination and is subject to this policy. A person who is not necessarily an intended victim or target of such harassment but is adversely affected by the offensive conduct may file a report of discrimination on his/her own behalf.[\[20\]](#)[\[21\]](#)[\[22\]](#)[\[23\]](#)[\[24\]](#)[\[25\]](#)[\[26\]](#)

For purposes of this policy, **harassment** shall consist of unwelcome conduct such as graphic, written, electronic, verbal or nonverbal acts including offensive jokes, slurs, epithets and name-calling, ridicule or mockery, insults or put-downs, offensive objects or pictures, physical assaults or threats, intimidation, or other conduct that may be harmful or humiliating or interfere with a person's school or school-related performance and which relates to an individual's or group's race, color, age, creed, religion, sex, sexual orientation, ancestry, national origin, marital status, pregnancy or handicap/disability when such conduct is:

1. Sufficiently severe, persistent or pervasive; and
2. A reasonable person in the complainant's position would find that it creates an intimidating, threatening or abusive educational environment such that it deprives or adversely interferes with or limits an individual or group of the ability to participate in or benefit from the services, activities or opportunities offered by a school.

DEFINITIONS

Sexual Harassment

Sexual harassment is a form of discrimination on the basis of sex and is subject to this policy. For purposes of this policy, **sexual harassment** shall consist of unwelcome sexual advances; requests for sexual favors; and other inappropriate verbal, nonverbal, written, graphic or physical conduct of a sexual nature when:

1. Submission to such conduct is made explicitly or implicitly a term or condition of a student's status in any educational or other programs offered by a school; or
2. Submission to or rejection of such conduct is used as the basis for educational or other program decisions affecting a student; or
3. Such conduct deprives a student or group of individuals of educational aid, benefits, services or treatment; or
4. Such conduct is sufficiently severe, persistent or pervasive that a reasonable person in the complainant's position would find that it unreasonably interferes with the complainant's performance in school or school-related programs, or otherwise creates an intimidating, hostile, or offensive school or school-related environment such that it unreasonably interferes with the complainant's access to or participation in school or school-related programs.

Federal law declares sexual violence a form of sexual harassment. **Sexual violence** means physical or sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual may also be unable to give consent due to an intellectual or other disability. Sexual violence includes but is not limited to rape, sexual assault, sexual battery and sexual coercion.



REPORTING AND RESPONSE

REPORTING AND RESPONSE

- K-12 schools are obligated to respond whenever an employee has **actual knowledge** of sexual harassment or allegations of sexual harassment
 - ACTUAL KNOWLEDGE = NOTICE
 - This applies for ANY EMPLOYEE, not just an administrator or Title IX coordinators
 - KEEP IN MIND: All school employees are mandated reporters
- TERMS TO BE AWARE OF:
 - Complainant = alleged victim
 - Respondent = alleged perpetrator
- Any person (e.g., the complainant or any third party) may report to a Title IX coordinator
 - By email, phone, or mail

RESPONSE

- Once the district has notice of sexual harassment or allegations of sexual harassment, it **MUST** respond promptly
- District cannot be **DELIBERATELY INDIFFERENT**
 - Response cannot be “clearly unreasonable” in light of the known circumstances
- Title IX Coordinator must provide information to the complainant:
 - The availability of supportive measures (with or without a formal complaint);
 - The right to file a complaint; and
 - How to file a complaint

SUPPORTIVE MEASURES

- Supportive measures are free, individualized services designed to restore or preserve equal access to education, protect safety, or deter sexual harassment
 - Counseling
 - Extensions of deadlines
 - Modifications of work or class schedules
 - Restrictions on contact between individuals
- Consider complainant's requests for supportive measures and must keep confidentiality

FORMAL COMPLAINT

- A formal complaint is a document **filed** by a complainant (or parents/guardians acting on behalf of parties) or **signed** by the Title IX Coordinator
 - Alleges sexual harassment against the accused and requests the school to investigate the allegation of sexual harassment
- At the time of filing formal complaint → complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed
- Formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, or by any additional method designated by the school
- “Document” means a document or electronic submission (email/online portal) that contains alleged victim’s physical or digital signature or otherwise indicates that the complainant is the person filing the formal complaint

FORMAL COMPLAINT

- What if complainant does not want to file a complaint?
 - Regs say to respect the complainant wishes UNLESS the coordinator determines that that signing a formal complaint to initiate an investigation over the wishes of the alleged victim is not unreasonable in light of the known circumstances
 - The Title IX would sign the formal complaint in this scenario
- Upon receipt of a formal complaint, the school must send written notice to BOTH parties (alleged victim and alleged perpetrators) of:
 - Allegations/facts that would constitute sexual harassment;
 - Presumption of innocence of the alleged perpetrator;
 - Statement that parties are entitled to advisor of their choice
 - Parties may request to inspect and review evidence
- Remember – **even without a formal complaint**, the school must provide supportive measures to the alleged victim
- However, a formal complaint triggers INVESTIGATION



INVESTIGATIONS

PURPOSE OF INVESTIGATIONS

- Gather relevant facts and relevant evidence
 - What happened? What were the circumstances? Who was involved?
- Provide basis for decisions on what action, if any, to take
- Establish expectations for behavior
- Best practice is to **enforce policies and procedures** to avoid liability

INVESTIGATION PROCESS

- Burden of gathering evidence and burden of proof remain on SCHOOLS, not parties
- Determine who should investigate the complaint
 - Use trained Title IX personnel to objectively evaluate all relevant evidence without prejudgment of the facts at issue and free from conflicts of interest or bias against either party
 - Conduct investigation with at least two people
 - This person cannot be part of the decision-making process
 - Avoid CONFLICTS OF INTEREST – do you know the people involved in a way that will compromise objectivity, do you have an interest in the outcome?
- Determine the order in which interviews will be conducted
 - Be prompt in beginning investigation. Memories fade and we want to get the most accurate information.
- Determine how information obtained during interviews from the alleged victim, alleged perpetrator, and witnesses will be documented

INVESTIGATION PROCESS

- Must send written notice of any investigative interviews, meetings, or hearings
- Ask open ended questions – who, what, where, when, why, and how
- If party has selected an advisor, this person may be present at the interview/investigation
- DOCUMENT!!!
 - Witness interviews
 - Communications with police, parents, victim, accused, witnesses
 - Supportive measures offered, implemented, or declined

REMAINING UNBIASED

- Everyone has their own set of values that are subjective. Shaped by education, gender, personal experience, etc. This influences the way we live and the decisions we make
- Stay objective and impartial
 - Objective means “*not influenced by personal feelings or opinions in considering and representing facts*”
 - “Four other people said you did it, why don’t you just admit that it happened?”
 - Biased. You’re not giving the person an honest opportunity to give their version of the story
- All information must be reviewed based on the FACTS not an opinion based on personal value system
- Avoid premature conclusions
 - You can assess credibility based on how the person responds to your questions BUT do not draw conclusions on this
 - Avoid credibility determinations based on a person’s status as a complainant, respondent, or witness

INVESTIGATION ERRORS TO AVOID

- Failure to interview students or witnesses who have information about the incident
- Failure to rule out other suspects or explanations
- Unreasonable delays
- Failure to pay attention to the facts/lack of focus
- Hasty interviews

INVESTIGATION PROCESS

- Must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review and respond to evidence
- Following the opportunity for inspection, review, and response – prepare written Title IX investigation report that fairly summarizes relevant evidence must be sent to the parties, and their advisors
 - Provide parties with at least 10 days for the parties to respond in writing before investigation report is finalized

AFTER INVESTIGATION

- The school district may choose to have a hearing but it is **OPTIONAL**
- With or without a hearing → school must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party
 - **RAPE SHIELD PROTECTION FOR COMPLAINANTS** – all questions/evidence about a complainant's prior sexual behavior is **irrelevant and inadmissible** UNLESS offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent
 - Similarly – any party's medical, psychological and similar records are not relevant/not subject to use in the grievance process unless the party has given voluntary, written consent

DISMISSAL

- Must dismiss allegations of conduct that do not meet the definition of sexual harassment or did not occur in the school's education program or activity
 - ONLY for Title IX purposes
 - Does not prevent the school from addressing the conduct in any manner the school deems appropriate
- In its discretion, the school may dismiss formal complaint or allegations if complainant submits request in writing or if the respondent is no longer enrolled/employed by the school, or if specific circumstances prevent school from gathering sufficient evidence to reach a determination
- MUST give parties written notice of a dismissal (mandatory or discretionary) and reasons for dismissal.

WRITTEN DETERMINATION

- All determinations must be made based on the preponderance of the evidence standard or the clear and convincing evidence standard
 - SAME STANDARD MUST BE USED FOR ALL FORMAL COMPLAINTS OF SEXUAL HARASSMENT, whether the respondent is a student or an employee
- Preponderance of the evidence – greater than 50% chance that the claim is true
 - Typically is the burden of proof in a civil trial
- Clear and convincing – evidence is highly and substantially more likely to be true than not
 - Higher standard than preponderance of the evidence
 - Used in both civil and criminal trials. Usually in claims involving fraud, wills, withdrawing life support
- Decision-maker cannot be the same person as the Title IX Coordinator or the investigator

WRITTEN DETERMINATION

- Written determination regarding responsibility must include:
 - Findings of fact;
 - Conclusions about whether the alleged conduct occurred;
 - Rationale for the result as to each allegation
 - Any disciplinary sanctions imposed on the respondent; and
 - Remedies that will be provided to the complainant
- Must be sent simultaneously to the parties including information about how to file an appeal

APPEALS

- Must offer both parties an appeal from a determination regarding responsibility, and from school's dismissal of a complaint or any allegations contained therein on the following bases:
 - Procedural irregularity that affected the outcome of the matter;
 - Newly discovered evidence that could affect the outcome of the matter;
 - Title IX personnel had a conflict of interest or bias that affected the matter
- May offer an appeal equally to both parties on additional bases

INFORMAL RESOLUTION PROCESS

- School may choose to offer and facilitate informal resolution options such as mediation/restorative justice
 - BOTH parties must give voluntary, informed, written consent
 - Any person who facilitates informal resolution must be well trained
- Cannot require waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment
- May not require parties to participate in an informal resolution process and may not offer informal resolution process unless formal complaint is filed
- Any time prior to agreeing to a resolution – any party may withdraw from the informal resolution process and resume grievance process with formal complaint
- MAY NOT offer informal resolution process for allegations involving an employer sexually harassing student

PROHIBITION ON RETALIATION

- Expressly prohibits retaliation
- Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of same facts or circumstances as a report/formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation
- Must keep confidential the identity of complainants, respondents, and witnesses or any individual that has made a report
- Complaints alleging retaliation may be filed in accordance with grievance procedures
- Exercise of rights under First Amendment does not constitute retaliation
- Charging individual with code of conduct violation for making materially false statement in bad faith in grievance proceeding does not constitute retaliation
 - A determination regarding responsibility alone is not sufficient to conclude that any party made a bad faith materially false statement



THANK
YOU

QUESTIONS?